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No. 84- .

# In the
# Supreme Court of the United States.

OCTOBER TERM, 1984.

JEANETTE ATTERBERRY,
PETITIONER,

*v.*

JOSEPH M. JORDAN, AS HE IS
POLICE COMMISSIONER OF THE
CITY OF BOSTON,
RESPONDENT.

**Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.**

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## Question Presented.

Whether a rule and a special order of the Boston Police Department, which require Boston Police officers on injured-on-duty leave to remain at their residences at all times unless permitted by the Police Commissioner to go elsewhere, unlawfully infringes on fundamental rights guaranteed to the petitioner by the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution.

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No. 84- .

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JEANETTE ATTERBERRY,
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*v.*

JOSEPH M. JORDAN, AS HE IS
POLICE COMMISSIONER OF THE
CITY OF BOSTON,
RESPONDENT.

**Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.**

The petitioner, Jeanette Atterberry, prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court for the State of Massachusetts in this case.

## Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts (Appendix A, *infra*) is reported at 392 Mass. 550, 467 N.E. 2d 150 (1984). The opinion of the Superior Court, Suffolk County (Appendix B, *infra*) is unreported.

## Jurisdiction.

This is a petition from a decision of the Supreme Judicial Court of Massachusetts, affirming the judgment of the state superior court below declaring that a Boston Police Department rule and special order are constitutionally valid. In her complaint, and throughout the proceedings in the state courts, the petitioner drew into question the validity of the rule and special order on the ground of their repugnance to the Constitution of the United States. Judgment was entered by the state superior court on March 4, 1983. On March 10, 1983, the petitioner filed a notice of appeal to the Massachusetts' Appeals Court. The appeal was subsequently transferred to the Massachusetts' Supreme Judicial Court on its own motion. On July 19, 1984, the Supreme Judicial Court issued its decision and entered judgment affirming the judgment of the superior court below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

## Constitutional Provisions and Regulations Involved.

The Constitutional provisions involved are the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the

United States. The pertinent text of such constitutional provisions is set forth in Appendix E. This case also involves Rule 110, § 22(D) of the Rules and Regulations of the Boston Police Department (Appendix F) and Boston Police Department Special Order 83-1 (Appendix G).

## Statement of the Case.

This case arises from an action commenced by the petitioner in the Superior Court, Suffolk County, Commonwealth of Massachusetts, seeking declaratory and injunctive relief pursuant to Mass. Gen. Laws. c. 231A. Specifically, the petitioner sought in her complaint a declaration that Rule 110, § 22(D) of the Rules and Regulations of the Boston Police Department, which requires police officers on leave for job related injuries to obtain the permission of the Police Commissioner prior to leaving their residences, constituted an unlawful interference with the petitioner's rights as guaranteed by the First and Fourth Amendments to the Constitution of the United States and the First and Second Amendments to the Constitution of Massachusetts. The petitioner further sought injunctive relief restraining the respondent Police Commissioner from requiring the petitioner to remain at home during the period of her disability unless permitted by the Police Commissioner to go elsewhere.

The facts giving rise to the commencement of the above action can be summarized briefly as follows: The petitioner, Jeannette Atterberry, is a police officer employed by the Boston Police Department. The respondent, Joseph M. Jordan, is the Police Commissioner for the City of Boston. On July 8, 1981, the petitioner, while on duty, was involved in an automobile accident as a result of which she was seriously injured, sustain-

ing a fractured pelvis, fractured ribs and a severe mace burn. From July 8, 1981 to the present time, the petitioner has been carried "injured on duty" by the Boston Police Department without loss of pay under Mass. Gen. Laws c. 41, § 111F (Appendix H).

Rule 110, § 22 of the Rules and Regulations of the Boston Police Department provides in pertinent part as follows:

> The Police Commissioner may not allow pay . . . for injury on duty status . . .
>
> D. If the officer shall fail to remain at his residence unless permitted by the Police Commissioner to go elsewhere.

(Appendix F).

Commencing on or about June 1, 1982, the petitioner, pursuant to the provisions of the rule as set forth above, telephoned the office of the Police Commissioner on several occasions for the purpose of obtaining permission to leave her home to purchase food, pay utility bills, take medically-prescribed walks as therapy for her fractured pelvis and back injuries, and to provide her twelve-year-old child with various forms of social activity. The petitioner is a single parent. On each occasion, a representative of the Police Commissioner denied her request, reminding her that she may only leave her home for the purpose of visiting physicians or to obtain medicines.

On Thursday, July 22, 1982, the petitioner telephoned the office of the Police Commissioner to request permission to leave her home on Friday, July 23, 1982, for the purpose of attending a church memorial service in memory of a family friend. On the same occasion, she also requested permission to attend the funeral service on Saturday, July 24, 1982. Upon each of these requests being denied by the Police Commissioner,

the petitioner, on July 29, 1982, filed her complaint in the Superior Court challenging the constitutionality of the police department rule.

On August 10, 1982, the Superior Court (Abrams, J.) issued a temporary restraining order, pending a hearing on the merits, enforcing Rule 110, § 22(D), against the petitioner but ordering that while permission to go elsewhere "shall be requested in all situations," such permission shall not be refused for four specific purposes:

> 1. To keep scheduled appointments with physicians, dentists and/or hospitals, whether or not medically related to her present injury, and for the proper care of her minor child's health.
> 2. To purchase food, household necessaries and medication for her present injury and for her minor child's health care.
> 3. To attend weekly church services.
> 4. To vote in the September, 1982 Primary Election, if registered.

(Appendix D).

In December of 1982, the petitioner requested the permission of the Police Commissioner to travel to Detroit, Michigan, during Christmas week to visit with her family and to place a stone on the grave of her mother. The Police Commissioner denied her request.

Subsequently, on January 5, 1983, two days before trial was to commence in the Superior Court, the Police Commissioner promulgated Special Order 83-1 (Appendix G), essentially adopting the procedures set forth in the court's temporary restraining order of August 10, 1982, Trial was then commenced in Suffolk Superior Court and the case was heard by

the trial judge (Murphy, J.) on January 7, 1983. The case was submitted to the court on the pleadings as augmented by a stipulation that as of the date of trial, some 109 officers or detectives out of a force of 1,548 were on sick or injured status for more than thirty days.

On January 10, 1983, the petitioner filed an amended complaint per allowance of the court on January 7, 1983. In her amended complaint, the petitioner claimed that Rule 110, § 22(D) of the Rules and Regulations of the Boston Police Department, as further implemented by Special Order 83-1, unlawfully interferred with those rights guaranteed to the petitioner by the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States and the First and Second Amendments to the Constitution of Massachusetts.

In a memorandum of decision dated March 2, 1983 (Appendix B) the trial judge (Murphy, J.) ordered that a declaration enter that Rule 110, § 22(D), as administered in accordance with Special Order 83-1, is not violative on the petitioner's constitutionally protected rights. Said declaration was then entered on the docket in a judgment on findings by the court dated March 4, 1983 (Appendix C).

In his decision upholding the constitutionality on the rule and special order, the trial judge relied primarily on this Court's decision in *Kelley* v. *Johnson*, 425 U.S. 238 (1976). He observed that the standard of review applied in *Kelley*, to determine the constitutionality of the hair-length regulation in question there, was whether the plaintiff could demonstrate no rational connection between the challenged regulation and the State's police powers. Applying this rational connection test to the challenged rule and special order here, the trial judge stated:

> The plaintiff has argued that the restrictions under which she has been placed infringe upon fundamental rights such

> as the right to travel. The court agrees. However, the question before the court is not whether her rights have been in some sense infringed, but whether the infringement is unlawful. . . .
>
> . . . . . .
>
> Applying the standard announced in *Kelley, supra,* the court finds that the government's interest in the expeditious return of injured officers to on-duty status provides more than ample justification for the imposition of the restrictions at issue . . . [T]he government clearly has a significant interest in assuring that continuing on sick leave is not a more attractive alternative than returning to duty. Accordingly, it cannot be said that the regulation is arbitrary.

(Appendix B at 15a-16a, 18a).

On March 10, 1983, the petitioner filed a notice of appeal to the Massachusetts' Appeals Court. The case was subsequently transferred to the Massachusetts' Supreme Judicial Court on its own motion. The issues presented on appeal to the Supreme Judicial Court were the same as those raised in the pleadings and before the lower court. These issues were raised by the brief and argument of the appellant and are the same issues now presented to this Court. The pleadings were part of the record before the Supreme Judicial Court.

On July 19, 1984, the Supreme Judicial Court issued its decision affirming the judgment of the Superior Court below. In agreeing with the approach taken by the trial judge with respect to the federal constitutional issues involved, the Supreme Judicial Court stated:

> Restrictions on the Federal constitutional rights of persons who are police officers, at least in so far as the restrictions

relate directly or indirectly to the officers in their official capacities, are permissible. *Kelley* v. *Johnson, supra* at 247. To pass facial constitutional scrutiny they need only be rationally connected, in a nonarbitrary fashion, with the State's interest in fostering public safety by furthering the efficient operation of its police force. *Id.* . . .

We conclude that the challenged rule and special order of the department are rationally connected with and foster the State's interests in maintaining an efficient police force to further public safety. . . .

(Appendix A at 7a-8a) (citations omitted).

## Reasons for Granting the Writ.

I. THE SUPREME JUDICIAL COURT OF MASSACHUSETTS HAS DECIDED A FEDERAL CONSTITUTIONAL QUESTION IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. *Rule 110, § 22(D), of the Rules and Regulations of the Boston Police Department, as Further Implemented by Special Order 83-1, Infringes on Fundamental Rights Guaranteed to the Petitioner by the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.*

Under Rule 110, § 22(D) of the Rules and Regulations of the Boston Police Department (Appendix E), as further implemented by Special Order 83-1 (Appendix F), Boston police officers on injured-on-duty leave are required to remain at their

residence at all times unless permitted by the Commissioner to go elsewhere. Such officers, who have been injured in the line of duty through no fault of their own, are confined to their homes and are, in effect, placed in the Commissioner's custody. Special Order 83-1 specifically prohibits and, in fact, penalizes an injured officer, who for any reason or purpose, leaves his residence without first requesting and obtaining the permission of the Commissioner. Moreover, the injured officer, in requesting such permission, must not only state his purpose for leaving his residence but must identify his destination and any companions, as well.

In the state courts below, the petitioner contended that Rule 110, § 22(D), as further implemented by Special Order 83-1, unlawfully interfered with rights guaranteed to her by the First, Fourth, Ninth, and Fourteenth Amendments to the United States Constitution. In support of her constitutional challenge, the petitioner relied upon the recent federal case of *Pienta* v. *Village of Schaumburg*, 536 F.Supp. 609 (N.D. Ill. 1982); judgment affirmed on appeal, 710 F.2d 1258 (7th Cir., 1983).

In *Pienta, supra*, the plaintiff, a police officer, challenged the constitutionality of two regulations of the Schaumburg Police Department which provided that employees on injured or sick leave must remain in their residences at all times except for matters relating to their injury or illness. In addressing the plaintiff's constitutional claims and the proper test to be applied in resolving such claims, the district court, at p. 611, stated:

> Under these regulations, SPD employees on injured-on-duty leave or on sick leave cannot leave their homes for *any* reason other than one medically related to their injury. By placing such restrictions on the activities of injured or sick SPD employees, the regulations infringe on several constitutionally protected rights, including the right to vote, the right to free exercise of religion and the right to

travel. That these rights are "fundamental" under our constitution cannot be questioned. *See School District of Abington* v. *Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963); *Shapiro* v. *Thompson*, 394 U.S. 618, 629, 89 S.Ct. 1322, 1328, 22 L.Ed.2d 600 (1969); *Dunn* v. *Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). The regulations impinge on more than just these specific recognized rights, however, for the SPD employees who fall under their coverage are denied "the freedom to care for [their] health and person, freedom from bodily restraint or compulsion (and the) freedom to walk, stroll or loaf." *Roe* v. *Wade*, 410 U.S. 113, 213, 93 S.Ct. 705, 758, 35 L.Ed.2d 147 (1973) (Douglas, J., concurring). They are, in effect, made prisoners in their own homes, and are deprived of their personal, individual liberty. Defendants contend that the regulations do not infringe on any constitutional rights because they do not on their face prohibit any protected activity and there are alternative means for any affected employees to exercise their rights. Defendants miss the point. A law neutral on its face may still infringe upon constitutional rights; it need not explicitly bar a protected activity. See *Thomas* v. *Review Board of Indiana Employment Services Division*, 450 U.S. 707, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1981); *Dunn*, 405 U.S. at 339, 92 S.Ct. at 1001; *Wesberry* v. *Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964). Accordingly, the court finds that the regulations at issue impinge on "fundamental" constitutional rights.

When rights of this nature are affected, the infringing regulations may only be justified by a showing of "compelling state interest." Further, the regulations "must be narrowly drawn to express the legitimate interests at stake.

536 F.Supp. 609 at 611 [quoting *Roe* v. *Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 727 (1973)].

Similar to the regulations challenged in *Pienta, supra,* the regulations in the instant case also infringe on several constitutionally protected rights, including the right to vote, the right to free exercise of religion, and the right to travel. Although Special Order 83-1 provides that an injured officer will be granted permission to leave his residence for a reasonable period to vote and to attend church services, the requirement that a citizen, police officer or not, must request from his or her employer permission to engage in these protected activities is constitutionally obnoxious. The fact that permission to engage in these protected activities will be granted upon request does not make the regulation any more palatable. This is especially true where, as here, the officer in making such request is required not only to state what constitutional activity he intends to engage in, but where and who he intends to engage in such protected activity with. As the court in *Pienta* noted above, a law neutral on its face need not explicitly bar a protected activity in order to infringe upon fundamental constitutional rights.

In addition to infringing on the petitioner's First Amendment right to freely exercise her religion, the regulations in the instant case also infringe on the petitioner's First Amendment rights of speech, assembly, and association. Since being out of doors and being free to move about are preconditions to the affective exercise of such First Amendments freedoms, the instant regulations, by restricting the movement and activities of police officers injured in the line of duty, severly burdens the free exercise of such rights.

Finally, the instant regulations, by their restrictions on movement, clearly infringe on the petitioner's right to travel. As both the court in *Pienta, supra* at 611, and in *Loughran* v. *Codd,* 432 F.Supp. 259, 263 (E.D. N.Y. 1976) observed, the

right to travel has repeatedly been recognized as a basic constitutional freedom. *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1971), *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1968).

The fundamental constitutional rights infringed upon in the instant case are not surrendered by an individual merely because he or she elects to become a police officer. As this Court stated in *Garrity* v. *New Jersey*, 385 U.S. 493, 500, 87 S.Ct. 616, 620 (1967):

> [P]olicemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.

In the instant case, the price exacted is not only the actual loss of injured-on-duty benefits but the constant threat of disciplinary measures as well, including dismissal or loss of employment. Under the infringing regulations, an injured officer who chooses to freely exercise his or her fundamental constitutional rights will receive no pay for his or her absence and, in addition, may be subject to discipline for violation of Department Rules and Regulations. See e.g., *Board of Selectmen of Framingham* v. *Civil Service Commission*, 7 Mass. App. Ct. 398, 409 (1979) (disobedience of a valid regulation constitutes justification for suspension).

The denial of a governmental benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). As this Court, in *Elrod*, stated:

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associ-

> ations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible

*Id.* at 359 [quoting *Perry* v. *Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)].

As Justice Brennan stated in his opinion for the Court in *NAACP* v. *Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963), First Amendment freedoms are "delicate and vulnerable," and "[t]he threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." Police officers should not be subject to the continuing threat of loss of benefits and disciplinary action if they dare to freely exercise their basic constitutional rights while on leave due to injury sustained in the performance of their duties.

B. *The Rational Connection Approach Taken by the State Court, in Determining that the Infringement of the Petitioner's Constitutional Rights was Not Unlawful, is Based Upon a Misreading of this Court's Decision in* Kelley *v.* Johnson, *425 U.S. 238 (1976). Limitations on a Public Employee's Fundamental Rights May Only be Justified by a Compelling State Interest.*

In its decision, the Superior Court below agreed with the petitioner that the restrictions under which she has been placed infringe upon her fundamental rights (Appendix B at 15a). Relying on *Kelley* v. *Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 57 L.Ed.2d 708 (1976), the Superior Court determined, however, that such infringement was not unlawful. In its decision, the court stated:

> The court takes the *Kelley* decision to stand clearly for the proposition that where regulations of government employees are thought to infringe upon constitutionally protected rights, the government need not show a compelling state interest even if the rights at issue are fundamental. Accord, *Loughran* v. *Codd*, 432 F.Supp. 259, 263-264 (E.D. N.Y. 1976) (rational basis test is proper standard of review for police regulation requiring members of the police force on sick leave to obtain police surgeon's permission prior to leaving residence or place of confinement).

(Appendix B at 16a).

The Superior Court's reliance, and the Supreme Judicial Court's subsequent reliance (Appendix A at 7a-8a), on the *Kelley* and *Loughran* cases is misplaced. As the court, in *Pienta* v. *Schaumburg*, *supra*, 536 F.Supp. at 611-612, explained:

> The approach taken by the court in *Loughran* and urged upon this court by defendants is based upon a misreading of the *Kelley* decision. The question of which test should be applied in determining the constitutionality of a particular regulation is governed by the nature of the rights affected. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 253, 94 S.Ct. 1076, 1079, 39 L.Ed.2d 306 (1974). The court in *Kelley* did not change this rule for public employees. Instead, it looked at the interest affected and noted that it was based on the general protection of the Fourteenth Amendment rather than an express constitutional right. *Kelley*, 425 U.S. at 245, 96 S.Ct. at 1444.

In *Kelley*, *supra*, the plaintiff, a police officer, challenged a hair length regulation which he contended violated his

"liberty" interest under the Fourteenth Amendment to choose his own hairstyle. Assuming, without deciding, that the citizenry at large has some sort of "liberty" interest within the Fourteenth Amendment in matters of personal appearance, the Court observed however that the plaintiff sought the protection of the Fourteenth Amendment not as a member of the citizenry at large but as a public employee. Noting that substantial restrictions on public employees lying at the core of the First Amendment had been recently upheld by the Court in *CSC* v. *Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) and *Broadrick* v. *Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the Court, at page 1445 of its decision, reasoned:

> If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.

*Kelley* v. *Johnson, supra* at 245.

In the Court's view, a police officer's "liberty" interest in freedom to choose his own hairstyle warranted only the most minimal scrutiny. Applying such a rational basis test, the Court found that either recognizability or *esprit de corps* constituted a "sufficiently rational justification . . . so as to defeat respondent's claim based on the liberty guarantee of the Fourteenth Amendment." *Id.* at 248.

In the instant case, the petitioner's claim is not based on the "liberty" interest of the Fourteenth Amendment but rather on a deprivation of express constitutional rights. Thus, the approach taken by this Court in *Kelley* is not controlling in the instant case.

As the Seventh Circuit, in *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976), stated:

> The test of constitutionality for invasions of a public employee's protected rights are derived from the nature of the rights involved. Where an employee argues he is being deprived of a right specifically protected by the Constitution, the standard generally applicable to deprivations of that right applies. For instance, limitations on the First Amendment rights of a public employee must be justified by a compelling state interest. *Elrod* v. *Burns*, ____ U.S. ____, 96 S.Ct. 2673, 48 L.Ed.2d ; *Illinois State Employees Union* v. *Lewis*, 473 F.2d 561, 572-573 (7th Cir. 1972). However, where the employee asserts that his right is protected by the general ambit of the Fourteenth Amendment, the state need show only that the rule is reasonable. *Kelley* v. *Johnson*, ____ U.S. ____, 96 S.Ct. 1440, 1444, 47 L.Ed.2d 708.

*Id.* at 1266. Accord, *Pienta* v. *Village of Schaumburg*, 710 F.2d 1258 (7th Cir. 1983).

In the post *Kelley* case of *Elrod* v. *Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), this Court was specifically presented with a claim by public employees alleging a deprivation of constitutional rights secured by the First Amendment. In determining the proper standard to be accorded such claim, this Court, at pp. 362-363 of its decision, stated:

> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley* v. *Valeo*, 424 U.S. at 64-65; *NAACP* v. *Alabama*, 357 U.S. 449, 460-461 (1958). 'This type of scrutiny is necessary even if any deterrent effect on the exercise of

First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct. . . .' *Buckley* v. *Valeo, supra* at 65. This encroachment 'cannot be justified upon a mere showing of a legitimate state interest.' *Kusper* v. *Pontikes,* 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. *Buckley* v. *Valeo, supra* at 94. *Williams* v. *Rhodes,* 393 U.S. at 31-33; *NAACP* v. *Button,* 371 U.S. 415, 438, 444 (1963); *Bates* v. *Little Rock,* 361 U.S. 516, 524 (1960); *NAACP* v. *Alabama, supra,* at 357 U.S. at 464-466, 78 S.Ct. at 1172-1173; *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. *Sherbert* v. *Verner, supra* at 406. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, see *United Public Workers* v. *Mitchell,* 330 U.S. at 96, and the government must 'emplo[y] means closely drawn to avoid unnecessary abridgment. . . .' *Buckley* v. *Valeo, supra* at 25. '[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.' *Kusper* v. *Pontikes, supra* at 59 (citations omitted). See *United States* v. *Robel,* 389 U.S. 258 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

*Elrod* v. *Burns, supra* at 362-363 (footnotes omitted).

In its decision, this Court expressly noted that its prior decision in *CSC* v. *Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 796 (1973) was not to the contrary.[1] In addressing its earlier decision in both *Letter Carriers* and a similar case, *United Public Workers* v. *Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), this Court stated:

> To be sure, *Letter Carriers* and *Mitchell* upheld Hatch Act restraints sacrificing political campaigning and management, activities themselves protected by the First Amendment. But in those cases it was the Court's judgment that congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association. Subordination of some First Amendment activity was permissible to protect other such activity. . . . For if the First Amendment did not place individual belief and association above political campaigning and management, at least in the setting of public employment, the restraints on those latter activities could not have been judged permissible in *Mitchell* and *Letter Carriers.*

*Elrod* v. *Burns, supra* at 370-371 (footnotes omitted).

Thus, even in *Mitchell* and *Letter Carriers,* this Court recognized that infringement on a public employee's fundamental

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[1] Both this Court in *Kelley, supra,* 425 U.S. at 245, and the state courts below (Appendix A at 9a; Appendix B at 18a) cited the *Letter Carriers* case in support of their respective holdings. However, while the *Kelley* Court cited *Letter Carriers* as support for imposing a rational relation standard with respect to a public employee's claim based on a "liberty" interest under the Fourteenth Amendment, the state courts below cited *Letter Carriers* as support for imposing a rational basis test with respect to a public employee's claim based on any constitutional right. Neither *Kelley* nor *Letter Carriers* supports such a proposition.

rights could only be justified by a more compelling interest. Accordingly, the state courts below erred in applying a rational basis test in the instant case.

C. *The Interests Served by the Instant Regulations are Not Compelling. Moreover, Rule 110, § 22(D) and Special Order 83-1 are Overbroad and Unnecessarily Infringe on the Petitioner's Fundamental Constitutional Rights.*

In the instant case, the Commissioner argued before the Superior Court below that Rule 110, § 22(D), as administered by Special Order 83-1, served to both "limit the potentialities for abuse of departmental sick leave policies and to expedite the rehabilitation of injured officers" (Appendix B at 10a-11a). As the court in *Pienta* v. *Schaumburg*, 536 F.Supp. 609 (1982), noted in addressing such interests:

> While there is no doubt that these objectives are important, they are not of the same weight as those interests which have been found to be compelling in the past. For example, in *Roe* v. *Wade*, the court found the state's interest in protecting the life of the fetus compelling, 410 U.S. at 163; and in *CSC* v. *Letter Carriers*, 413 U.S. 548, 564-565, 93 S.Ct. 2880, 2889-2890, 37 L.Ed.2d 796 (1973), the court found the federal government's interest in ensuring politically neutral operation to be compelling and upheld regulations barring federal employees from participation in certain political activities. Even in light of the fact that the state's interest in regulating public employees is greater than the state's interest in regulating private citizens, *Kelley*, 425 U.S. at 245, 96 S.Ct. at 1444, the court concludes that the predominately administrative concerns which are served be General Order 79-59 and Administrative General Order 79-9 do not rise to the level of compelling state interests.

Even assuming that the state interests served by the regulations are compelling, the test for constitutionality would still not be met because General Order 79-59 and Administrative General Order 79-9 are overbroad and unnecessarily infringe on constitutionally protected activity.

> [A] state may not [citation omitted] choose means that unnecessarily restrict constitutionally protected liberty. 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP* v. *Button*, 371 U.S. 415, 438 [83 S.Ct. 328, 340, 9 L.Ed.2d 405] (1963). If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberty. . . .

*Kusper* v. *Pontickes*, 414 U.S. 51, 58-59, 94 S.Ct. 303, 308, 38 L.Ed.2d 260 (1973). The regulations in question create a broad prohibition that bars SPD employees who are on sick or injured leave from exercising their fundamental rights regardless of whether a particular activity is consistent with the department's sick and injured policies. Thus, under the regulations, an employee with a broken limb who may not be ready to return to work, but who is mobile, cannot attend religious services or even go outside for some fresh air. Or an employee who is home with the flu who gets a call from the school saying his child has been injured cannot leave his home to respond. In fact, under these regulations, an employee who is home with a bad cold and who is stricken with a heart attack *may* get 'permission to leave [his/her] residence during the period of recuperation without requiring telephone notification to the Police Department.' [Administrative General Order 79-9, P I] Defendants argue

> that the regulations are not overly broad because an employee who is too sick to go to work should not be anywhere other than at home. The hypotheticals posed by the court, as well as simple common sense, point out the unrealistic nature of this argument. Allowing the employees in the cited examples to leave their homes would not be inconsistent with the SPD's desire to prevent abuse of its policies and to maintain a sufficiently numerous work force. If the SPD is going to place restrictions on its employees' lives outside of work, it must, at a minimum, relate those restrictions to the purpose to be served. The present regulations do not provide a sufficient relation between the ends served and the means; they do not take into consideration the injury or the illness involved, the recuperation period, the activity to be engaged in, or any other outside criteria. Rather, they place a broad restriction on the lives of SPD employees on sick and injured leave. In doing so, they unnecessarily infringe on those employees' fundamental constitutional rights and are consequently unconstitutional.

*Id.* at 612-613.

The regulations in the instant case similarly place a broad restriction on the lives of Boston police officers on injured or sick leave. Under the instant regulations, an officer on injured or sick leave is required to remain at his residence at all times unless permitted by the Commissioner to go elsewhere. Regardless of the type of injury or illness involved or the length of the recuperative period, such officer is arbitrarily confined to his or her home twenty-four hours a day, seven days a week for the entire period of his or her medical incapacity. In its present posture, an injured police officer with, for instance, his arm in a cast, would not be able to take his or her family or

friends out to dinner without obtaining permission to do so. Indeed, Special Order 83-1 requires that even if permission is granted, the officer must identify those with whom he is dining. Moreover, not only is the officer confined and his activities regulated during those hours which he would normally be scheduled to work if he was "on-duty," but the officer is similarly restricted during those hours which he would normally be "off-duty" as well.

The Commissioner contends however (without producing any evidence, medical or otherwise, to support such a claim) that such broad restrictions are necessary to limit the "potentialities" for abuse and to enhance rehabilitation. Even assuming, at face value, that the instant regulations serve to foster such interests, confinement to one's home and regulation of one's private life are extreme measures which may be justified by only the most compelling of interests. The administrative concerns purportedly served by the instant regulations are ill-suited to justify such a broad encroachment on an employee's fundamental constitutional rights. This is especially true where other mechanisms are available to the Commissioner which have a less drastic impact on constitutionally protected freedoms. For example, the Commissioner may inquire as to the officer's activities while on injured leave. See, e.g. *Broderick* v. *Police Commissioner of Boston,* 368 Mass. 33, 330 N.E.2d 199 (1975) (Activities of a police officer while off-duty may be subject to scrutiny by the Commissioner). However, while the Supreme Judicial Court, in *Broderick,* held that certain aspects of a police officer's or other public employee's private life may be subject to scrutiny, nowhere in its decision did the Court state that an employee's private life could be regulated or that an employee, while off-duty for any reason, could be confined to his or her home in deprivation of his or her basic constitutional rights.

Finally, as the United States Court of Appeals for the Seventh Circuit, in affirming the judgment of the district court in *Pienta, supra,* 536 F.Supp. 609, observed:

> Finally, even under the rational basis test these regulations are of questionable validity. Defendants' basic argument is that an employee who is too sick or injured to report even for restricted duty is by definition too sick or injured to leave the house for any purpose — to go to court, to church, to a polling place, to a family picnic, or to respond to any emergency call on a personal matter. Yet an employee injured with a broken arm may not be able to report even for restricted duty desk jobs, but he is perfectly able to go to church or to court on a parking ticket. An employee with the flu may not qualify even for restricted duty but is perfectly able to leave the house to pick up his child at school if she gets sick or injured and suddenly has to come home. In addition, enforcement of the policy will not necessarily serve the Department's stated purpose of preventing abuse so as to save money and conserve manpower. Because the regulations do not require a doctor's certificate for sick leave for less than three days, for example, the dishonest employee can feign illness for such time and simply collect sick pay as long as he stays in his home. The 'stay at home' requirement thus has no relation to the medical needs of the individual employee, and as such, has no relation to the legitimate interest of the Department in preventing abuse. In fact, the sick leave regulation grants the Chief of Police, rather than a medical officer, the power to permit employees to leave their homes without requiring notification to the Department! Cf. *Loughran* v. *Codd, supra,* 432 F.Supp. at 261 (district surgeon had power to decide whether and to what extent home confinement appropriate).

> Of course, a municipal police department has a legitimate interest in handling sick and injury relief policies to assure the ability to carry out its public services. Some restrictions on the activities of an employee on leave are justifiable, and the Department should be entitled to verify whether an employee's absence from home is consistent with a claim of disability. See *Gissi* v. *Codd, supra,* 391 F.Supp. at 1336. Here however, the two challenged regulations go too far in infringing on established constitutional rights.

*Pienta* v. *Schaumburg,* 710 F.2d 1258, 1261 (7th Cir. 1983).

Similar to the regulations challenged in *Pienta, supra,* the rule and special order challenged in the instant case also go too far in infringing on established constitutional rights and thus should not have been upheld by the state courts below.

## Conclusion.

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

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**Appendix A.**

# COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, July 19, 1984.

IN THE CASE NO. SJC-3450

JEANETTE ATTERBERRY

*vs.*

POLICE COMMISSIONER OF BOSTON

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 56272

ORDERED, that the following entry be made in the docket; viz., —

Judgment affirmed.

BY THE COURT,

_____, CLERK.
Jean M. Kennett

---

July 19, 1984

See opinion on file.

# JEANETTE ATTERBERRY *vs.* POLICE COMMISSIONER OF BOSTON.

Suffolk. April 5, 1984. — July 19, 1984.

Present: HENNESSEY, C.J., WILKINS, LIACOS, LYNCH, & O'CONNOR, JJ.

*Police*, Injury on duty, Regulations. *Constitutional Law*, Public employment.

The standard of review to be applied in determining the constitutionality of regulations governing the conduct of police officers is whether there is a rational connection between the regulations and the State's interest in fostering public safety by furthering the efficient operation of a police force. [ ]

There was no constitutional infirmity in a regulation and order of the Boston police department requiring officers on leave because of illness or injury to notify the department before leaving their homes for certain specified purposes and to obtain permission from the department before leaving their homes for any other reason. [ ]

CIVIL ACTION commenced in the Superior Court Department on July 29, 1982.

The case was heard by *John L. Murphy, Jr.*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court ordered direct appellate review on its own initiative.

*Frank J. McGee* for the plaintiff.

*Nicholas Foundas* for the defendant.

HENNESSEY, C.J. The facial constitutionality of a rule and special order of the Boston police department (department) is the focus of this appeal. The plaintiff challenged the facial constitutionality of rule 110, § 22(D), of the rules and regulations of the department (rule 110, § 22[D]) and department Special Order No. 83-1. She sought a declaration, pursuant to G. L. c. 231A, § 1, that these regulations violated her rights under the Massachusetts and Federal Constitutions. A judge of the Superior Court ruled otherwise. He entered a judgment

declaring that the challenged rule and special order do not abridge her constitutional rights. The plaintiff appealed and we transferred the case here on our own motion. We agree with the trial judge and affirm his judgment.

The facts are not disputed.[1] The plaintiff is a police officer employed by the Boston police department. On July 8, 1981, while on duty, she was involved in an automobile accident as a result of which she was seriously injured. From July 8, 1981, until at least the time that the plaintiff commenced this action, she has been carried "injured on duty" by the department without loss of pay under G. L. c. 41, § 111F.[2] Rule 110, § 22(D), in relevant part states that: "The Police Commissioner may not allow pay . . . for injury on duty status . . . D. If the officer shall fail to remain at his residence unless permitted by the Police Commissioner to go elsewhere." Pursuant to this rule, the plaintiff requested permission to leave her residence several times between July 8, 1981, and August 10, 1982. Permission to leave was sometimes granted and sometimes denied. On July 29, 1982, the plaintiff filed a complaint in the Superior Court challenging the facial validity of the rule. A judge of the Superior Court entered a temporary restraining order on August 10, 1982, requiring that permission to leave

[1] The case was submitted to the judge on the pleadings, a stipulation of facts, and two exhibits.

[2] General Laws c. 41, § 111F, as amended by St. 1977, c. 646, § 2, provides in relevant part: "Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in accordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter."

her residence be granted to the plaintiff for certain matters.[3] The department formalized and extended the mandate of this temporary restraining order in its Special Order No. 83-1, promulgated on January 5, 1983, two days before trial of the plaintiff's claim.[4] The special order narrows rule 110, § 22(D).

[3] The judge's order provided in part: "Pending a hearing on the merits, the Plaintiff will be required to remain at her residence unless permitted by the Defendant to go elsewhere, as set forth in Rule 110, Section 22 of the Rules and Regulations of the Boston Police Department. Permission to go elsewhere, *which shall be requested in all situations*, shall not be refused for the following specific purposes: 1. To keep scheduled appointments with physicians, dentists and/or hospitals, whether or not medically related to her present injury, and for the proper care of her minor child's health. 2. To purchase food, household necessaries and medication for her present injury and for her minor child's health care. 3. To attend weekly church services. 4. To vote in the September, 1982 Primary Election, if registered . . ." (emphasis in original).

[4] Special Order No. 83-1 consists of the following:

"SUBJECT: SICK OR INJURED OFFICERS REMAINING AT THEIR RESIDENCE

"Rule 110, Section 22 provides, in part: 'The Police Commissioner may not allow pay from accumulated sick credit or for injury in the line of duty status if the officer shall fail to remain at his residence, unless permitted by the Police Commissioner to go elsewhere.'

"In order to aid in the administration of this rule, the following procedures are to be implemented effective *immediately*:

"All officers disabled from work for sickness or injury and being carried on the time books of the Department pursuant to Rule 110, ss. 4, 5, or 16, shall remain at the residence officially listed in the Department's personnel records unless they receive permission from the Operations Division or their Commanding Officer to be elsewhere.

"Officers shall contact the Operations Division to request permission to leave the residence for the following specific purposes. In each instance, with the exception noted, the Operations Division will grant permission to be absent from the residence for reasonable times for these specific purposes:

"1. To keep scheduled appointments with physicians, dentists, physical therapists, and/or hospitals, or clinics, whether or not related to the officer's present sickness or injury.

"2. To purchase food, household necessities and medication for the officer's present injury or illness or for the health care of minor children.

"NOTE: One four-hour period to complete such shopping, as described in Number 2 above, shall be granted each week. Additional requests shall be granted only for emergency purposes.

"3. To attend church services.

"4. To register to vote or to vote in elections for municipal, county, State or Federal offices, or regularly scheduled union elections.

It provides that a police officer on injured on duty status cannot be denied permission to leave her residence for certain specified purposes, but must notify the department of certain matters before leaving and upon returning. The trial judge then allowed the plaintiff to amend her complaint to include a challenge to the special order. At the time of trial, the department had 1,778

"5. To engage in physical exercise such as walking or swimming, recommended in writing by an attending physician.

"6. To answer court subpoenas in cases arising out of the officer's employment.

"7. To report to Headquarters or other police facilities when ordered to do so by a superior or commanding officer.

"The officer should make such requests by contacting the Operations Division at 247-4590. In making the request, the officer will state his purpose or purposes in leaving his residence, his destination or destinations, his planned time of departure, his method of transportation, his companions if any, and his estimated time of return to his residence. Upon returning to his residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

"Permission to leave the residence for any purpose other than those listed above will not be granted unless approved by the officer's Commanding Officer. Sick and Injured personnel should contact the commander at work during the commander's regularly scheduled working hours in order to obtain a determination prior to finalization of their plans to leave the residence.

"Officers who obtain such permission from their Commanding Officers will notify the Operations Division at 247-4590 prior to leaving the residence of the fact that they are leaving, that permission was obtained of the purpose or purposes for leaving the residence, the destination or destinations, the departure time, method of transportation, companions if any, and estimated time of return to residence.

"Upon returning to the residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

"Operations Division personnel and Commanding Officers shall maintain records of all telephone requests and whether granted; as well as report of return to residence, on the Department form provided for such purpose.

"Sick or injured officers must obtain permission for every absence from their residence until they return to work, including for time periods during which, if the officer were working, would be non-work hours or days off.

"Officers not in compliance with this order or away from their residence without permission, will receive no pay for the day of their absence, or, if normally a day off, no pay for the next regularly scheduled work day. In addition, they may be subject to discipline for violation of Department Rules and Regulations.

"The Bureau of Investigative Services, Staff Inspection Unit, and the Personnel Division shall be responsible for ensuring compliance with this order."

sworn members. Of these, 1,548 were patrol officers or detectives. Department records showed that at the time 184 sworn members of the department were on sick or injured status, of which 169 were patrol officers or detectives. Of the total figure of 184 department members, 117 had been on sick or injured status for over thirty days. Of the officers and detectives, 109 had been on sick or injured status for over thirty days.

The judge found no merit in the plaintiff's claims. In upholding the facial constitutionality of the rule and special order, he relied primarily on the United States Supreme Court's decision in *Kelley* v. *Johnson*, 425 U.S. 238 (1976). He observed that the standard of review applied in *Kelley* to determine the constitutionality of the regulations in question was whether the plaintiff could demonstrate no rational connection between the challenged regulations and the State's police powers. *Id.* at 247. The judge then applied this rational connection test to the challenged rule and special order here: "The plaintiff has argued that the restrictions under which she has been placed infringe upon fundamental rights such as the right to travel. The court agrees. However, the question before the court is not whether her rights have been in some sense infringed, but whether the infringement is unlawful. . . . Applying the standard announced in [*Kelley,*] *supra,* the court finds that the government's interest in the expeditious return of injured officers to on-duty status provides more than ample justification for the imposition of the restrictions at issue. . . . [T]he government clearly has a significant interest in assuring that continuing on sick leave is not a more attractive alternative than returning to duty. Accordingly, it cannot be said that the regulation is arbitrary."

The plaintiff's argument on appeal is in three parts. She claims that the challenged rule and special order infringe upon her constitutionally protected rights, that the rational connection standard of review employed by the judge is inapplicable, and that interests asserted by the department in support of its rule and special order are not compelling. We do not address whether the asserted interests of the department are compelling as we conclude that the judge was correct in applying the

"rational connection" test announced in *Kelley* in reviewing the facial constitutionality of the rule and special order challenged here. We note also that while the plaintiff's brief refers once to the Massachusetts Constitution as a basis for her claim, it contains no separate discussion of Massachusetts constitutional principles. Accordingly, we review the plaintiff's claim solely on the basis of an alleged violation of Federal constitutional principles. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975).

The single circumstance which most clearly directs our consideration of this appeal is that the challenged rule and special order relate to the plaintiff in her official capacity as a government employee. Where the constitutional rights of government employees are at issue, greater infringements have been tolerated than where those of the citizenry in general are involved. See *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968). For example, the Supreme Court has sustained comprehensive restrictions on First Amendment rights of both Federal and State employees. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 618 (1973). *United States Civil Serv. Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973). Similarly, we have found that police officers could be required to answer official questionnaires regarding their private activities, at least where the private activities were "undertaken under a cloak of officialdom." *Broderick* v. *Police Comm'r of Boston*, 368 Mass. 33, 41 (1975), cert. denied sub nom. *Broderick* v. *DiGrazia*, 423 U.S. 1048 (1976). "While government employees do not relinquish their first amendment rights when they enter public service, those rights, unlike the rights of the citizenry-at-large, are subject to the state's paramount interest in promoting the efficiency of the public services it performs through its employees." *Hughes* v. *Whitmer*, 714 F.2d 1407, 1418 (8th Cir. 1983), cert. denied sub nom. *Hughes* v. *Hoffman*, 104 S. Ct. 1275 (1984). The considerations applicable in assessing the facial constitutionality of the challenged rule and special order are less exacting than if they were applicable to, and challenged by, private citizens.

Restrictions on the Federal constitutional rights of persons who are police officers, at least in so far as the restrictions

relate directly or indirectly to the officers in their official capacities, are permissible. *Kelley* v. *Johnson, supra* at 247. To pass facial constitutional scrutiny they need only be rationally connected, in a nonarbitrary fashion, with the State's interest in fostering public safety by furthering the efficient operation of its police force. *Id. Shawgo* v. *Spradlin,* 701 F.2d 470, 483 (5th Cir.), cert. denied sub nom. *Whisenhunt* v. *Spradlin,* 104 S. Ct. 404 (1983). *Loughran* v. *Codd,* 432 F. Supp. 259, 263-265 (E.D.N.Y. 1976). *Broderick* v. *Police Comm'r of Boston, supra.* But cf. *Pienta* v. *Schaumburg, Ill.,* 710 F.2d 1258, 1260 (7th Cir. 1983). While more exacting scrutiny may be brought to a review of a restriction which precludes completely an officer's exercise of her First Amendment rights, or punishes an officer for the substance of her beliefs or expression, see *Connick* v. *Myers,* 103 S. Ct. 1684, 1687-1690 (1983); *Branti* v. *Finkel,* 445 U.S. 507, 517 (1980); *Perry* v. *Sindermann,* 408 U.S. 593, 597 (1972), no such situation is alleged here. We therefore need consider in this facial challenge to the department's rule and special order only whether they rationally foster the efficient operation and organization of the department.

We conclude that the challenged rule and special order of the department are rationally connected with and foster the State's interests in maintaining an efficient police force to further public safety. Rule 110, § 22(D), and Special Order No. 83-1, do not impose an arbitrary restriction on all movement and exercise of constitutional freedoms by an officer on injured on duty status. Rather, they establish a reasonable system by which the department may monitor the movement and activities of personnel who are receiving full pay while not having to report for active duty. The system promotes reasonableness, and negates arbitrariness, in its provision that permission will not be denied in seven specific, and important, matters. As stressed by the department in its brief and oral argument before this court, Special Order No. 83-1, modifies rule 110, § 22(D), to require only that injured on duty employees notify the department of participation in those activities allowed under it. Although Special Order No. 83-1 could be

read to require employees to request permission, which could not be denied, before engaging in the actions permitted under the special order, we accept and hold the department to its representation that the special order only requires notice. It is not constitutionally impermissible to require the plaintiff to inform the department before and after engaging in the activities allowed under Special Order No. 83-1. The department could rationally conclude that such measures would assist in preventing unnecessary absences, and would improve efficiency. The measure may be viewed in light of the fact that, as of the date of trial, 109 patrol officers or detectives out of a force of 1,548 were on sick or injured status for more than thirty days. We recognize the possibility that a facially constitutional scheme may be applied unconstitutionally by its administrators in some circumstances, but the only issue raised in this case is that of facial constitutionality. Reviewing rule 110, § 22(D), and Special Order No. 83-1 for their facial constitutionality, we find they impose no arbitrary restrictions on the plaintiff's constitutional rights, nor do they exceed the department's authority to regulate the conduct of its officers. Accordingly, we agree with the declaration of rights ordered by the judge.

*Judgment affirmed.*

**Appendix B.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 56272

JEANETTE ATTERBURY

*vs.*

POLICE COMMISSIONER OF THE CITY OF BOSTON[1]

MEMORANDUM OF DECISION

BACKGROUND AND FACTS

The case arises out of a regulation of the Boston Police Department which requires officers on sick leave for job related injuries to obtain the permission of the Police Commissioner (the Commissioner) prior to leaving their residences. Plaintiff Jeanette Atterbury (the plaintiff) seeks a declaration, pursuant to G.L. c. 231A, Sec. 1 that the subject regulation, Rule 110, Sec. 22(d) of the Rules and Regulations of the Boston Police Department, is an unlawful interference with the plaintiff's rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Art. 1 and 2 of the Massachusetts Declaration of Rights. The Commissioner argues that the regulation is necessary to limit the potentialities for abuse of departmental sick leave policies and to expedite

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[1] Joseph M. Jordan

the rehabilitation of injured officers. The parties have submitted this matter to the court for a judgment on the pleadings as augmented by a stipulation that, inter alia, some 109 officers or detectives out of a force of 1,548 were on sick or injured status for more than 30 days, as of the date of trial.

On July 8, 1981 while on duty the plaintiff was involved in an automobile accident, sustaining a fractured pelvis, fractured ribs, and a severe mace burn. She has been on sick leave since that time. On numerous occasions she has sought to obtain the permission of the Commissioner to leave her residence, which has in some instances been granted, and in others denied. In particular, the Commissioner declined to grant permission to attend the memorial service and funeral of a friend in July of 1982, to purchase food, to pay utility bills, to take therapeutic walks, to visit Detroit during Christmas week of 1982 to visit her family and to place a stone on the grave of her mother. The Commissioner's position has conssistently been that she may only leave her residence in order to visit physicians and to purchase medicine.

On August 10, 1982 the plaintiff sought and obtained an order of the court that permission to leave her home be granted:

> "1. To keep scheduled appointments with physicians, hospitals whether or not medically related to her present injury, and for the proper care of her minor child's health.
>
> 2. To purchase food, household necessaries and medication for her present injury and for her minor child's health care.
>
> 3. To attend weekly church services.
>
> 4. To vote in the September, 1982 Primary Election, if registered."

## DISCUSSION

Rule 110, Sec. 22(d) of the Rules and Regulations of the Boston Police Department provides in pertinent part that "[t]he Police Commissioner may not allow pay from accumulated sick credit or for injury on duty status if the reported sickness or injury proves to be feigned, simulated or exaggerated, or . . . [i]f the officer shall fail to remain at his residence unless permitted by Police Commissioner to go elsewhere."

On January 5, 1983, the Commissioner's office promulgated Special Order 83.1 adopting administrative procedures as follows:

"All officers disabled from work for sickness or injury and being carried on the time books of the Department pursuant to Rule 110, ss. 4, 5, or 16, shall remain at the residence officially listed in the Department's personnel records unless they receive permission from the Operations Division or their Commanding Officer to be elsewhere.

Officers shall contact the Operations Division to request permission to leave the residence for the following specific purposes. In each instance, with the exception noted, the Operations Division will grant permission to be absent from the residence for reasonable times for these specific purposes:

1. To keep scheduled appointments with physicians, dentists, physical therapists, and/or hospitals, or clinics, whether or not related to the officer's present sickness or injury.

2. To purchase food, household necessities and medication for the officer's present injury or illness or for the health care of minor children.

NOTE: One four-hour period to complete such shopping as described in Number 2 above, shall be granted only for emergency purposes.

3. To attend church services.

4. To register to vote or to vote in elections for municipal, county, State or Federal offices, or regularly scheduled union elections.

5. To engage in physical exercise such as walking or swimming, recommended in writing by an attending physician.

6. To answer court subpoenas in cases arising out of the officer's employment.

7. To report to Headquarters or other police facilities when ordered to do so by a superior or commanding officer.

The officer should make such requests by contacting the Operations Division at 247-4590. In making the request, the officer will state his purpose or purposes in leaving his residence, his destination or destinations, his planned time of departure, his method of transportation, his companions if any, and his estimated time of return to his residence. Upon returning to this residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

Permission to leave the residence for any purpose other than those listed above will not be granted unless approved by the officer's Commanding Officer. Sick and Injured personnel should contact the commander at work during the commander's regularly scheduled working hours in order to obtain a determination prior to finalization of their plans to leave the residence.

Officers who obtain such permission from their Commanding Officers will notify the Operations Division at 247-4590 prior to leaving the residence of the fact that they are leaving, that permission was obtained, of the purpose or purposes for

leaving the residence, the destination or destinations, the departure time, method of transportation, companions if any, and estimated time of return to residence.

Upon returning to the residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

Operations Division personnel and Commanding Officers shall maintain records of all telephone requests and whether granted; as well as reports of return to residence, on the Department form provided for such purpose.

Sick or injured officers must obtain permission for every absence from their residence until they return to work, including for time periods which, if the officer were working, would be non-work hours or days off.

Officers not in compliance with this order or away from their residence without permission, will receive no pay for the day of their absence, or, if normally a day off, no pay for the next regularly scheduled work day. In addition, they may be subjected to discipline for violation of Department Rules and Regulations.

The Bureau of Investigative Services, Staff Inspection Unit, and the Personnel Division shall be responsible for ensuring compliance with this order."

In *Kelly* v. *Johnson*, 425 U.S. 238 (1976), the Supreme Court considered whether a police department regulation limiting the hair length of uniformed officers violated an officer's fourteenth Amendment "liberty" interests. Assuming, without deciding, that there is a protected Fourteenth Amendment interest in personal appearance, the Court nevertheless upheld the regulation in question, stressing that the officer sought a determination of his rights "not as a member of the citizenry at large, but on the contrary as an employee of the police department." *Id.* at 245. Noting that "[t]he promotion of safety of

persons and property is unquestionably at the core of the State's police power," *id.* at 247; see *Shelton* v. *Tucker,* 364 U.S. 427, 488 n.8 (1960) (government has greater administrative leeway to promote efficiency where clearly constitutional central purpose), the Court rejected the officer's argument that the government must demonstrate a compelling State interest, holding that the standard of review for regulations affecting government employees is "whether respondent can demonstrate that there is no rational connection between the regulation, based . . . on the county's method of organizing its police force, and the promotion of safety of persons and property." *Id.* at 247. See *Board of Selectmen of Framingham* v. *Civil Service Comm'r,* 7 Mass. App. Ct. 398, 406 (1979) (regulations of government employees need not promote compelling State interest, requiring only rational basis so as not to be arbitrary).

The plaintiff has argued that the restrictions under which she has been placed infringe upon fundamental rights such as the right to travel. The court agrees. However, the question before the court is not whether her rights have been in some sense infringed, but whether the infringement is unlawful.

"The authority to establish a police force would be futile if it did not carry with it, at least by implication, the authority to enact reasonable rules and regulations for the effective administration of the force and to compel obedience to them by reasonable means." *Ryan* v. *Marlborough,* 318 Mass. 610, 612 (1975). Applying the standard announced in *Kelly, supra,* the court finds that the government's interest in the expeditious return of injured officers to on-duty status provides more than ample justification for the imposition of the restrictions at issue. With nearly fifteen percent of the force on extended full pay sick leave, the government clearly has a significant interest in assuring that continuing on sick leave is not a more attractive

alternative than returning to duty. Accordingly, it cannot be said that the regulation is arbitrary.

Moreover, the court notes that very substantial restrictions on governmental employees which would be unquestionably impermissible with respect to citizens in general have been upheld. See, e.g. *CSC* v. *Letter Carriers,* 413 U.S. 548, 530 (1973) (Hatch Act, 5 U.S.C. Sec. 734 4(a)(2), prohibiting Federal employees from taking active part in political management of political campaigns not unconstitutional on its face); *Pickering* v. *Board of Education,* 391 U.S. 563, 570 (1968) (limitations on government employees' First Amendment rights permissible where confidentiality necessary).

There is some authority that even in the case of regulations affecting government employees, where fundamental rights are concerned, the government must show a compelling State interest. See, *Pienta* v. *Shumburg,* 536 F.Supp. 609, 610-612 (N.D. Ill. 1982) (declaring unconstitutional regulation providing that employees on sick leave must remain in their residences at all times except for matters relating to that injury, as rights affected were fundamental and government had failed to demonstrate compelling State interest). The court rejects this approach. Were it necessary to distinguish between fundamental and other rights in order to decide whether the government regulation must be supported by a compelling State interest or merely by a rational basis, the holding in *Kelley, supra,* would make little sense. The court takes the *Kelley* decision to stand clearly for the proposition that where regulations of governmental employees are thought to infringe upon constitutionally protected rights, the government need not show a compelling State interest even if the rights at issue are fundamental. Accord, *Loughran* v. *Codd,* 432 F. Supp. 259, 263-264 (E.D. N.Y. 1976) (rational basis test is proper standard of review for police regulation requiring members of the police force on sick leave to obtain police surgeon's permission prior to leaving residence or place of confinement).

Arguably, there may be instances where the impact of the regulation upon the employee's rights is so disproportionate to the governmental interests sought to be advanced that it would be necessary for this court to consider whether the regulation is impermissibly overreaching. See, *CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973). (Court must strike balance between employer's interests in promoting efficiency of public services and employee's interests). Such would undoubtably be the case if the regulation reached "purely private activity." *Broderick* v. *Police Comm'r of Boston*, 368 Mass. 33, 41, (1975). See, *Schuman* v. *Philadelphia*, 470 F. Supp. 449, 459 (Pa. 1979) (departmental inquiry into police officer's personal off-duty activities absent showing of impact on job performance violates right to privacy). The regulation in question, if administered in accordance with the recently promulgated procedures, satisfies any such "balancing of interests" requirement.

## ORDER

Accordingly, it is *Ordered* that a declaration enter that Rule 110, Sec. 22(d) of the Rules and Regulations of the Boston Police Department, as administered in accordance with Special Order 83.1, is not violative of the plaintiff's constitutionally protected rights.

/s/_____

John L. Murphy, Jr.
Justice of the Superior Court

Entered: March 2, 1983

**Appendix C.**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
DEPARTMENT OF
THE TRIAL COURT
CIVIL ACTION
No. 56272

JEANETTE ATTERBURY
Plaintiff(s)

*v.*

POLICE COMMISSIONER OF CITY OF BOSTON
Defendant(s)

JUDGMENT ON FINDINGS BY THE COURT

This Action came on for hearing before the court, Murphy J.L. J., presiding, and the issues having been duly heard and findings having been duly rendered; it is ordered and adjudged as follows:

1. That Rule 110, Section 22(d) of the Rules and Regulations of the Boston Police Dept. is administered in accordance with Special Order 83.1, is not violative of the plaintiff's constitutionally protected rights.

Dated at Boston, Massachusetts, this 4th day of March 1983 form of judgment approved:

Michael Joseph Donovan,
Clerk of Court

/s/_____
Justice of the Superior Court Department

By: /s/_____
Assistant Clerk

## Appendix D.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
No. 56272

JEANETTE ATTERBERRY

*vs.*

JOSEPH M. JORDAN

O R D E R

Pending a hearing on the merits, the Plaintiff will be required to remain at her residence unless permitted by the Defendant to go elsewhere, as set forth in Rule 110, Section 22 of the Rules and Regulations of the Boston Police Department. Permission to go elsewhere, *which shall be requested in all situations*, shall not be refused for the following specific purposes:

1. To keep scheduled appointments with physicians, dentists and/or hospitals, whether or not medically related to her present injury, and for the proper care of her minor child's health.
2. To purchase food, household necessaries and medication for her present injury and for her minor child's health care.
3. To attend weekly church services.
4. To vote in the September, 1982 Primary Election, if registered.

*Pienta* v. *The Village of Schaumburg, Illinois*, 536 F. Supp. 609 (1982).

The Court further orders all pleadings to be completed on or before September 3, 1982 and that this matter be placed on the Jury-Waived Trial List for the week of September 13, 1982.

/s/_____
Herbert Abrams
Justice of the Superior Court

August 10, 1982

## Appendix E.

Constitution of the United States.

### Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of Grievances.

### Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparge others retained by the people.

### Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Appendix F.

Boston Police Department Rule No. 110.

§ 22. REGULATIONS GOVERNING OFFICERS ABSENT FROM DUTY BECAUSE OF SICKNESS OR INJURY: The Police Commissioner may not allow pay from accumulated sick credit or for injury on duty status if the reported sickness or injury proves to be feigned, simulated or exaggerated, or:

A. Arises from carelessness, negligence, or improper conduct.

B. Arises from over-indulgence in alcohol or the illegal use or abuse of narcotic drugs.

C. If the officer shall fraudulently, by concealment, false statement or otherwise, seek to deceive or mislead an attending physician or surgeon concerning his case.

D. If the officer shall fail to remain at his residence unless permitted by the Police Commissioner to go elsewhere.

E. If the officer refuses or fails to conform to the instructions and/or recommendations of an attending physician or surgeon.

F. If the officer fails to cooperate with the Department in obtaining medical or other evidence relating to his incapacity and treatment therefore.

G. If the officer fails to comply with recommendations made by the Department physician which are not in conflict with the instructions given by an attending physician.

**Appendix G.**

Special order Number 83-1

TO: All Bureaus, Divisions, Districts, Offices, Sections, and Units

COPIES TO: All Superintendents, Deputy Superintendents, and Directors

January 5, 1983

SUBJECT: SICK OR INJURED OFFICERS REMAINING AT THEIR RESIDENCE

Rule 110, Section 22 provides, in part:

> "The Police Commissioner may not allow pay from accumulated sick credit or for injury in the line of duty status if the officer shall fail to remain at his residence, unless permitted by the Police Commissioner to go elsewhere."

In order to aid in the administration of this rule, the following procedures are to be implemented effective *immediately*:

All officers disabled from work for sickness or injury and being carried on the time books of the Department pursuant to Rule 110, ss. 4, 5 or 16, shall remain at the residence officially listed in the Department's personnel records unless they receive permission from the Operations Division or their Commanding Officer to be elsewhere.

Officers shall contact the Operations Division to request permission to leave the residence for the following specific purposes. In each instance, with the exception noted, the Operations Division will grant permission to be absent from the residence for reasonable times for these specific purposes:

1. To keep scheduled appointments with physicians, dentists, physical therapists, and/or hospitals, or clinics, whether or not related to the officer's present sickness or injury.

2. To purchase food, household necessities and medication for the officer's present injury or illness or for the health care of minor children.
NOTE: One four-hour period to complete such shopping, as described in Number 2 above, shall be granted each week. Additional requests shall be granted only for emergency purposes.
3. To attend church services.
4. To register to vote or to vote in elections for municipal, county, State or Federal offices, or regularly scheduled union elections.
5. To engage in physical exercise such as walking or swimming, recommended in writing by an attending physician.
6. To answer court subpoenas in cases arising out of the officer's employment.
7. To report to Headquarters or other police facilities when ordered to do so by a superior or commanding officer.

The officer should make such requests by contacting the Operations Division at 247-4590. In making the request, the officer will state his purpose or purposes in leaving his residence, his destination or destinations, his planned time of departure, his method of transportation, his companions if any, and his estimated time of return to his residence. Upon returning to his residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

Permission to leave the residence for any purpose other than those listed above will not be granted unless approved by the officer's Commanding Officer. Sick and Injured personnel should contact the commanders at work during the commander's regularly scheduled working hours in order to obtain a determination prior to finalization of their plans to leave the residence.

Officers who obtain such permission from their Commanding Officers will notify the Operations Division at 247-4590 prior to leaving the residence of the fact that they are leaving, that permission was obtained, of the purpose or purposes for leaving the residence, the destination or destinations, the departure time, method of transportation, companions if any, and estimated time of return to residence.

Upon returning to the residence, the officer will contact the Operations Division at 247-4590 to notify the Department that he has returned.

Operations Division personnel and Commanding Officers shall maintain records of all telephone requests and whether granted; as well as reports of return to residence, on the Department form provided for such purpose.

Sick or injured officers must obtain permission for every absence from their residence until they return to work, including for time periods during which, if the officer were working, would be non-work hours or days off.

Officers not in compliance with this order or away from their residence without permission, will receive no pay for the day of their absence, or, if normally a day off, no pay for the next regularly scheduled work day. In addition, they may be subject to discipline for violation of Department Rules and Regulations.

The Bureau of Investigative Services, Staff Inspection Unit, and the Personnel Division shall be responsible for ensuring compliance with this order

/s/_____

Francis J. Coleman
Acting Police Commissioner

## Appendix H.

Massachusetts General Laws, Chapter 41, Section 111 F.

Whenever a police officer or fire fighter of a city, town, or fire or water district is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after such police officer or fire fighter has been retired or pensioned in ac cordance with law or for any period after a physician designated by the board or officer authorized to appoint police officers or fire fighters in such city, town or district determines that such incapacity no longer exists. All amounts payable under this section shall be paid at the same times and in the same manner as, and for all purposes shall be deemed to be, the regular compensation of such police officer or fire fighter. This section shall also apply to any member of a fire department who is subject to the provisions of chapter one hundred and fifty-two if he is injured at a fire and if he waives the provisions of said chapter.

Where the injury causing the incapacity of a fire fighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section, was caused under circumstances creating a legal liability in some person to pay damages in respect thereof, either the person so injured or the city, town or fire or water district paying such compensation may proceed to enforce the liability of such person in any court of competent jurisdiction. The sum recovered shall be for the benefit of the city, town of fire or water district paying such compensation, unless the

sum is greater than the compensation paid to the person so injured, in which event the excess shall be retained by or paid to the person so injured. For the purposes of this section, "excess" shall mean the amount by which the total sum received in payment for the injury, exclusive of interest and costs, exceeds the amount paid under this section as compensation to the person so injured. The party bringing the action shall be entitled to any costs recovered by him. Any interest received in such action shall be apportioned between the city, town or fire or water district and the person so injured in proportion to the amount received by them respectively, inclusive of interest and costs. The expense of any attorney's fees shall be divided between the city, town or fire or water district and the person so injured in proportion to the amounts received by them respectively.

Whoever intentionally or negligently injures a fire fighter or police officer for which he is granted a leave without loss of pay and is paid compensation in accordance with the provisions of this section shall be liable in tort to the city, town or fire or water district paying such compensation for all costs incurred by such city, town or fire or water district in replacing such injured police officer or fire fighter which are in excess of the amount of compensation so paid.